

THE HONORABLE JOHN C. COUGHENOUR

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
IN SEATTLE**

RUSHFORTH CONSTRUCTION CO.,  
INC. d/b/a AP | RUSHFORTH, a  
Washington corporation

Plaintiff,

v.

ARCH SPECIALTY INSURANCE  
COMPANY, a foreign insurance company;  
ENDURANCE AMERICAN SPECIALTY  
INSURANCE COMPANY, a foreign  
insurance company; SCOTTSDALE  
INSURANCE COMPANY, a foreign  
insurance company; JAMES RIVER  
INSURANCE COMPANY, a foreign  
insurance company; SENECA  
SPECIALTY INSURANCE COMPANY,  
a foreign insurance company; GEMINI  
INSURANCE COMPANY, a foreign  
insurance company; UNITED  
SPECIALTY INSURANCE COMPANY,  
a foreign insurance company; MITSUI  
SUMITOMO INSURANCE COMPANY  
OF AMERICA, a foreign insurance  
company; OHIO SECURITY  
INSURANCE COMPANY, a foreign  
insurance company; THE OHIO  
CASUALTY INSURANCE COMPANY, a

No. 2:17-cv-01063-JCC

PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
AGAINST DEFENDANTS WESCO  
INSURANCE COMPANY AND  
UNITED SPECIALTY INSURANCE  
COMPANY

**NOTE ON MOTION CALENDAR:  
MARCH 2, 2018**

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY  
JUDGMENT AGAINST DEFENDANTS WESCO  
INSURANCE COMPANY AND UNITED SPECIALTY  
INSURANCE COMPANY - 1

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foreign insurance company; NEW HAMPSHIRE INSURANCE COMPANY, a foreign insurance company; WESCO INSURANCE COMPANY, a foreign insurance company,

Defendants.

# **I. INTRODUCTION & RELIEF REQUESTED**

This is an insurance coverage and bad faith dispute. Plaintiff Rushforth Construction Co. is a general contractor that performed construction work on a multi-building, mixed use project located in Bellevue called Lake Hills Village (the "Project"). Rushforth qualifies as an additional insured under commercial general liability insurance policies issued by Defendants Wesco and USIC to two of Rushforth's subcontractors on the Project.

In October 2015, the owner of the Project sued Rushforth, alleging various construction defects at the Project (the "Underlying Action"). Rushforth tendered the lawsuit to Wesco and USIC in July 2016, seeking a defense and indemnity against the Project owner's claims.

Wesco acknowledged receipt of Rushforth's tender, but neither defended nor explained to Rushforth why a defense wasn't owed. Instead, Wesco fell silent for more than a year with no further communication.

USIC, on the other hand, never acknowledged or responded to Rushforth's tender at all. Like Wesco, USIC didn't defend Rushforth. Nor did it explain why it wouldn't provide a defense.

Over the next year, Wesco and USIC each received four additional letters requesting a coverage decision. Neither responded. Rushforth filed this lawsuit in July 2017. Less than two weeks later, Wesco offered (for the first time) to defend Rushforth. USIC followed suit

1 three months later. Rushforth took the position that USIC and Wesco were in breach of their  
 2 respective insurance contracts, rejected the belated attempts to defend as untimely, and  
 3 reserved all rights and claims in this lawsuit.

4 Both insurers concede that they owed Rushforth a defense, but both failed to accept  
 5 that defense for over a year. And even then, Wesco and USIC only offered to defend Rushforth  
 6 after they were sued (and after failing to respond to multiple requests for a coverage position).  
 7 These actions are textbook bad faith, violate Washington's insurance claims-handling  
 8 regulations, and caused harm to Rushforth. Rushforth therefore respectfully requests an order  
 9 that: (1) Wesco and USIC each owed Rushforth a duty to defend; (2) Wesco and USIC  
 10 unreasonably breached their duties to defend; and (3) Wesco and USIC cannot cure their  
 11 breach or bad faith conduct by forcing Rushforth to accept a belated defense.

## 12 **II. STATEMENT OF FACTS**

### 13 **A. THE LAKE HILLS VILLAGE PROJECT**

14 In February 2013, Rushforth entered into a construction agreement with Lake Hills  
 15 Investments LLC ("Lake Hills"), through which Rushforth agreed to serve as the general  
 16 contractor for several phases of the Project. *Dkt. 72* at ¶ 3. Rushforth, in turn, contracted with  
 17 several subcontractors, including Sound Glass Sales, Inc. and Lizard Waterproofing. *Dkt. 72*,  
 18 *Ex. A-B*. Sound Glass agreed to supply and install portions of the Project's building envelope,  
 19 including the storefronts of several buildings. *Dkt. 72, Ex. A*. Lizard agreed to perform  
 20 waterproofing work at the concrete decks, elevator pits, and other areas of the Project. *Dkt.*  
 21 *72, Ex. B*.

On October 28, 2015, Lake Hills filed the Underlying Action against Rushforth.<sup>1</sup> Lake Hills alleged damage to, and defects at, the Project, including “breaches of water in building envelopes, elevator shafts and pits, the Phase 5A deck extension, and the garage.” *Dkt. 72, Ex. C.*

## **B. THE POLICIES**

Wesco issued liability insurance to Sound Glass, including policy numbers WPP126477600 and WPP126477601, covering consecutive policy periods from May 1, 2015 through May 1, 2017 (the “Wesco Policies”). *Dkt. 72, Ex. D.*<sup>2</sup> USIC issued liability insurance to Lizard, policy number BTO-1316248, covering the policy period of August 7, 2013 to August 7, 2014 (the “USIC Policy”). *Dkt. 72, Ex. E.*

In these policies, Wesco and USIC promised to defend and indemnify their respective insureds, including additional insureds, against claims alleging “property damage”:

We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . “property damage” to which this insurance applies. *We will have the right and duty to defend the insured against any “suit” seeking those damages.*

*Dkt. 72, Ex. D* at 3; *Ex. E* at 2 (emphasis added). The Policies go on to define “property damage” to mean “[p]hysical injury to tangible property.” *Dkt. 72, Ex. D* at 4; *Ex. E* at 4. “Property damage” is covered if it is caused by an “occurrence” during the policy period. *Dkt. 72, Ex. D* at 4; *Ex. E* at 4. “Occurrence” is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” *Dkt. 72, Ex. D* at 4; *Ex. E* at 3.

<sup>1</sup> Lake Hills filed an Amended Complaint on June 20, 2016. *Dkt. 72, Ex. C.*

<sup>2</sup> Rushforth is providing a copy of the 2015 Wesco Policy as representative of the both Wesco policies. The Wesco policies do not differ materially for purposes of this motion.

The Wesco and USIC policies contain Additional Insured endorsements. *Dkt. 72, Ex. D* at 5-7; *Ex. E* at 5-6. Those endorsements provide that a person or entity is an additional insured if required by “written contract” and apply to liability for “‘property damage’ caused, in whole or in part, by” the named insured’s work. *Id.* The Insurance Addendum to the Sound Glass and Lizard subcontracts provide that Rushforth “shall be named as primary additional insureds . . . with respect to work performed by or for the Subcontractor or on behalf of the Contractor.” *Dkt. 72, Exs. A-B.*

### **C. WESCO FAILS TO RESPOND TO RUSHFORTH’S REQUEST FOR INSURANCE BENEFITS**

On July 1, 2016, Rushforth tendered the Underlying Action to Wesco. *Dkt. 73, Ex. A.* Wesco, through its third-party claims administrator, acknowledged receipt of that claim. *Dkt. 73* at ¶ 4. Over the next two months, Wesco requested (and Rushforth provided) additional documents and information. *Id.* By September 1, Wesco had concluded that it owed Rushforth a defense. *Dkt. 74, Ex. A.* But Wesco never told Rushforth that.

Worse yet, Wesco’s claim file shows that Wesco was consistently aware that it owed Rushforth a coverage position. But Wesco choose to ignore that obligation:

- September 1, 2016 – Claims adjuster Pete Harris concluded that “[t]here are no endorsements in the policy to defeat coverage under the Blanket Ai [sic] endorsement.” Mr. Harris drafts a reservation of rights letter. *Dkt. 74, Ex. A.*
- September 23, 2016 – The draft reservation of rights letter is sent to Claims Manager, Daniel Barta. Mr. Barta is asked to “review ROR for approval and issuance.” *Dkt. 74, Ex. A.* Wesco does not send the ROR letter.
- November 11, 2016 – Wesco receives a letter requesting a coverage position and stating that Rushforth has “yet to receive a substantive response from Wesco to the additional insured tender. As such, we solicit your soonest additional insured coverage position.” *Dkt. 74, Ex. B.* Mr. Harris forwards the letter to Mr. Barta and writes: “It is not clear if you approved the [ROR letter]. Would you please let me

1 know and if not please approve.” *Dkt. 74, Ex. A*. Wesco does not send the ROR  
2 letter.

- 3 • January 18, 2017 – Wesco receives another letter requesting a coverage position.  
4 Mr. Harris emails Mr. Barta again: “Please approve this AI ROR ASAP as the AI  
5 atty is asking about it again. Letter goes back to Sept. 16.” *Dkt. 74, Ex. A*. Wesco  
6 does not send the ROR letter.
- 7 • March 7, 2017 – Wesco receives another letter requesting a coverage position. Mr.  
8 Harris emails Mr. Barta again: “They are again asking for our response. Please  
9 see below and attached and please process ASAP.” *Dkt. 74, Ex. A*. Wesco does  
10 not send the ROR letter.
- 11 • May 24, 2017 – Wesco receives another letter requesting a coverage position. *Dkt.*  
12 *74, Ex. C*. Wesco does not send the ROR letter.

13 Rushforth filed this lawsuit on July 13, 2017. *Dkt. 1*. On July 26, Wesco finally mailed  
14 the reservation of rights letter it had drafted nearly a year earlier. *Dkt. 73, Ex. B*. Wesco  
15 conceded that it owed—and offered to provide—Rushforth a defense for the Underlying  
16 Action. *Id.* Rushforth rejected Wesco’s proffered defense as untimely:

17 Wesco’s offer to accept its duty to defend AP Rushforth came only after Wesco  
18 had been served with the coverage lawsuit. AP Rushforth rejects Wesco’s  
19 proffered defense as untimely and in bad faith. AP Rushforth reserves its right  
20 to pursue all claims against Wesco, including its breach of contract and bad  
21 faith claims.

22 *Dkt. 74, Ex. D*.

#### 23 **D. USIC FAILS TO RESPOND TO RUSHFORTH’S REQUEST FOR INSURANCE BENEFITS**

On July 12, 2016, Rushforth tendered the Underlying Action to USIC. *Dkt. 73, Ex. C*.  
USIC didn’t respond. *Dkt. 73* at ¶ 6. Letters requesting USIC’s coverage position were sent  
on November 11, 2016; January 17, 2017; March 7, 2017; and May 24, 2017. *Dkt. 74, Ex. E*.  
Rushforth never received a response to any of those letters. *Dkt. 73* at ¶ 7.

After 15 months of silence (and three months after it was sued) Rushforth finally  
received a purported reservation of rights letter from USIC. *Dkt. 73, Ex. D*. USIC agreed to

defend Rushforth in the Underlying Action. USIC also claimed that its letter was “intended as a follow-up” to an earlier letter dated August 16, 2016. *Id.* But Rushforth never received that letter. *Dkt. 73* at ¶ 6. Moreover, all four letters sent to USIC requesting a coverage position explained that Rushforth had “yet to receive a response from USIC to the additional insured tender.” *Dkt. 74, Ex. E.* To Rushforth’s knowledge, USIC never responded to those letters, nor did it forward the purported “August 16, 2016” letter. *Dkt. 73* at ¶ 7.

On November 7, 2017, Rushforth rejected USIC’s proffered defense as untimely. *Dkt. 74, Ex. F.*

### III. STATEMENT OF ISSUES

The issues presented are (1) whether Wesco and USIC owed and breached their respective duties to defend Rushforth; (2) whether those breaches were unreasonable and therefore in bad faith; and (3) whether Wesco and USIC can “cure” their breach by offering Rushforth a defense after breach has occurred and where Rushforth rejected the belated offer to defend.

### IV. EVIDENCE RELIED UPON

This motion is based on the pleadings and other papers previously filed in this lawsuit, together with the second declaration of Brenna Mann.

### V. ARGUMENT

#### A. **WESCO AND USIC OWED RUSHFORTH A DUTY TO DEFEND**

The Wesco and USIC policies provide that an entity is an additional insured if required by “written contract.” *Dkt. 72, Ex. D* at 5-7; *Ex. E* at 5-6. The subcontracts between Rushforth and Wesco’s and USIC’s named insureds—Sound Glass and Lizard—provide that Rushforth

1 “shall be named” as a primary additional insured. *Dkt. 72, Exs. A-B*. Thus, Rushforth is an  
 2 additional insured under the Wesco and USIC policies.

3 In Washington “the duty to defend is different from and broader than the duty to  
 4 indemnify.” Am. Best Food, Inc. v. Alea London, Ltd., 229 P.3d 693, 696 (Wash. 2010). An  
 5 insurer’s “duty to defend arises based on the insured’s *potential* for liability and whether  
 6 allegations in the complaint *could conceivably* impose liability on the insured.” Woo v.  
 7 Fireman’s Fund Ins. Co., 164 P.3d 454, 463 (Wash. 2007) (emphasis in original).

8 The allegations in the complaint must be liberally construed in favor of coverage.  
 9 Truck Ins. Exch. v. Vanport Homes, Inc., 58 P.3d 276, 281–82 (Wash. 2002); R. A. Hanson  
 10 Co. v. Aetna Ins. Co., 612 P.2d 456, 459 (Wash. 1980) (requiring “liberal construction of the  
 11 pleadings to bring them within the scope of the insurer’s obligation to defend”). Simply put,  
 12 “[a]n insurer must defend if the claim is *potentially* within the policy.” R.A. Hanson, 612 P.2d  
 13 at 459 (emphasis added); *see also* Kirk v. Mt. Airy Ins. Co., 951 P.2d 1124, 1126 (Wash. 1998)  
 14 (insurer must defend suit “alleging facts and circumstances arguably covered by the policy”).

15 “[I]f it is not clear from the face of the complaint that the policy provides coverage,  
 16 but coverage could exist, the insurer *must* investigate and give the insured the benefit of the  
 17 doubt that the insurer has a duty to defend.” Woo, 164 P.3d at 459 (emphasis in original).  
 18 “The insurer may not rely on facts extrinsic to the complaint to deny the duty to defend—it  
 19 may do so only to trigger the duty.” Woo, 164 P.3d at 459. “Again, if there is any reasonable  
 20 interpretation of the facts or the law that could result in coverage, the insurer must defend.”

21 Am. Best Food, 229 P.3d at 700.



The Underlying Action alleges that Rushforth is liable for damage arising from work performed by Wesco's and USIC's named insureds, including water intrusion at the building envelopes (Sound Glass), as well as the elevator pits, deck extension, garage, and other locations (Lizard). *Dkt. 72, Ex. C*. Both Wesco and USIC have conceded—albeit more than a year after receiving Rushforth's claim—that these allegations trigger their respective duties to defend. *See Dkt. 73, Ex. B* (“Wesco agrees to provide Rushforth a defense”); *Dkt. 73, Ex. D* (“United Specialty agrees to join in the defense of Rushforth in regard to the allegations made by Lake Hills . . . in the [Underlying Action].”). Thus, whether Wesco and USIC owe a duty to defend is not in dispute.

#### **B. WESCO AND USIC BREACHED THEIR RESPECTIVE DUTIES TO DEFEND**

“In Washington, the duty to defend arises upon the filing of a covered complaint.” *Griffin v. Allstate Ins. Co.*, 29 P.3d 777, 781 (Wash. Ct. App. 2001). An insurer breaches its duty to defend when it fails to provide a *timely* defense.<sup>3</sup> This is true even if the insurer later offers to provide a defense. *See, e.g., Ledcor Industries (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 206 P.3d 1255, 1260 (Wash. Ct. App. 2009) (finding a breach of the duty to defend where insurer accepted tender 14 months after receipt); *Jaco Envtl., Inc. v. Am. Intern. Specialty Lines Ins. Co.*, 2:09-CV-0145JLR, 2009 WL 1591340, at \*6 (W.D. Wash. May 19, 2009)

<sup>3</sup> *See, e.g., New Hampshire Indem. Co., Inc. v. Budget Rent-A-Car Systems, Inc.*, 64 P.3d 1239, 1243 (Wash. 2003) (“The insured should not be left without a prompt and proper defense . . .”); *Newmont USA Ltd. V. Am. Home Assur. Co.*, 676 F. Supp. 2d 1146, 1158 (E.D. Wash. 2009) (“[O]nce triggered, an insured is entitled to a full and complete defense from every insurer having a duty to defend.”); *see also Kirby v. Hartford Cas. Ins. Co.*, 2004 U.S. Dist. LEXIS 11736 (N.D. Texas, June 10, 2004) (“Hartford breached the policy by delaying after its duty to defend became reasonably certain.”); *McFarland v. First American Title Ins. Co.*, 595 F. Supp. 630, 635 (D. Mont. 1984) (insurer breached its duty to defend “when it failed to assume [insured’s] defense within a reasonable time after receiving notice”).

(insurer breached duty to defend by initially denying a defense notwithstanding subsequent offer to defend).

Here, the Underlying Action was filed on October 28, 2015, and an Amended Complaint was filed on June 20, 2016. Thus, Wesco's and USIC's duty to defend Rushforth arose no later than June 20, 2016. Rushforth tendered the Underlying Action to Wesco and USIC in July 2016. *Dkt. 73, Ex. A, C*. But Wesco and USIC made no attempt to accept their admitted duties to defend—nor did they even respond to multiple requests for a coverage decision—until July 26, 2017, and November 1, 2017, respectively. *Dkt. 73, Ex. B, D*.

Offering a defense more than a year after receiving a tender is not “timely” under any reasonable interpretation. Wesco and USIC therefore breached their respective duties to defend.

### **C. WESCO AND USIC BREACHED THEIR DUTIES TO DEFEND IN BAD FAITH**

An insurer that breaches its contractual duty to defend can also be liable for the tort of bad faith. *See, e.g., Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 250 P.3d 121, 125 (Wash. Ct. App. 2011) (“An insurer is liable for the tort of bad faith if the insurer breaches its good faith duty to defend.”). “[A]n insurance company’s duty of good faith rises to an even higher level than that of honesty and lawfulness of purpose toward its policyholder: an insurer must deal fairly with an insured, giving equal consideration *in all matters* to the insured’s interests.” *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1136 (Wash. 1986) (citations omitted).

An insurer violates this duty to act “in good faith” when it “acts without reasonable justification.” *Keller v. Allstate Ins. Co.*, 915 P.2d 1140, 1144 (Wash. Ct. App. 1996). It follows that “[a] denial of coverage that is unreasonable, frivolous, or unfounded constitutes

bad faith.” Wright v. Safeco Ins. Co. of America, 109 P.3d 1, 9-10 (Wash. Ct. App. 2004).  
 The insurer’s conduct need not be fraudulent or intentional to constitute bad faith. *See*  
Sharbono v. Universal Underwriters Ins. Co., 161 P.3d 406, 421 (Wash. Ct. App. 2007) (“An  
 insurer may breach its broad duty to act in good faith by conduct short of intentional bad faith  
 or fraud.”).

Here, Wesco and USIC unreasonably breached their duties to defend, and therefore  
 acted in bad faith, by failing to provide a timely defense. *See, e.g., Cedar Grove Composting,*  
Inc. v. Ironshore Specialty Ins. Co., No. C14-1443RAJ, 2015 WL 3473465, at \*6 (W.D. Wash.  
 June 2, 2015) (“A refusal to pay a demand for coverage reasonably promptly is an  
 unreasonable denial of benefits, *even if only temporary.*”) (emphasis added).<sup>4</sup> And Wesco  
 and USIC have offered no excuse to justify their delay.

Moreover, Wesco and USIC violated at least five provisions of Washington’s “Unfair  
 Claims Settlement Practices Act,” WAC 284-30-300 *et seq.*, by failing to (1) take *any*  
 coverage position for more than a year; (2) respond to Rushforth’s communications relating  
 to coverage; and (3) promptly investigate Rushforth’s claim.<sup>5</sup> These “WAC” regulations were

<sup>4</sup> *See also* Ledcor, 206 P.3d at 1260 (“The only action MOE took on Ledcor’s tender was to send an acceptance of tender and reservation of rights letter 14 months later. . . . The court properly found MOE acted in bad faith.”); Taladay v. Metro. Grp. Prop. & Cas. Ins. Co., No. C14-1290-JPD, 2016 WL 3681469, at \*20 (W.D. Wash. July 6, 2016) (“Although MetLife never explicitly denied plaintiffs’ requests for coverage, MetLife’s unreasonable delay in payment and/or underpayment of various aspects of plaintiffs’ claim violated IFCA.”).

<sup>5</sup> *See, e.g.,* WAC 284-30-330(2) (“Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies”); WAC 284-30-330(3) (“Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies”); WAC 284-30-360(1) (“Within ten working days after receiving notification of a claim under an individual insurance policy, or within fifteen working days with respect to claims arising under group insurance contracts, the insurer must acknowledge its receipt of the notice of claim”); WAC 284-30-360(3) (“For all other pertinent communications from a claimant reasonably suggesting that a response is expected, an appropriate reply must be provided within ten working days for individual insurance policies”); WAC 284-30-370 (“Every insurer must complete its investigation of a claim within thirty days after notification of claim.”).

promulgated by Washington’s Insurance Commissioner to define the “specific acts and practices which constitute a breach of an insurer’s duty of good faith.” Tank, 715 P.2d at 1136. A “[v]iolation of Washington’s insurance regulations is evidence of bad faith.” Seaway Properties, LLC v. Fireman’s Fund Ins. Co., 16 F. Supp. 3d 1240, 1253 (W.D. Wash. 2014). Thus, Wesco and USIC also acted in bad faith through their multiple WAC violations.

#### **D. WESCO’S AND USIC’S BREACHES CAUSED HARM TO RUSHFORTH**

Wesco and USIC claim that, because some of Rushforth’s other insurers are providing a defense, their breaches of the duty to defend didn’t harm Rushforth.<sup>6</sup> But this Court previously rejected that argument and found that—even where another insurer is defending—the failure to defend itself “constitutes damage” because the insured doesn’t “receive the benefit of the bargained-for exchange”:

Greenwich essentially argues that it cannot be found to have breached its duty to defend because Harris received an adequate defense and was never billed for the defense costs. The Court disagrees.

. . . When Greenwich prematurely stopping paying for Harris’ defense, Harris did not receive the benefit of the bargained-for exchange, which constitutes damage.

Nat’l Union Fire Ins. Co. v. Greenwich Ins. Co., No. C07-2065-JCC, 2009 WL 272895, at \*5 (W.D. Wash. Feb. 2, 2009).<sup>7</sup> And anyway, Rushforth suffered harm in at least three additional ways.

<sup>6</sup> If the Court finds that Wesco and USIC breached their duties in bad faith, then harm is presumed. Safeco Ins. Co. of Am. v. Butler, 823 P.2d 499, 504 (Wash. 1992) (“[W]e presume prejudice in any case in which the insurer acted in bad faith.”). Thus, Wesco and USIC would have the burden to prove the absence of prejudice. *See Butler*, 823 P.2d at 504 (“Presuming prejudice once the insured establishes bad faith shifts the burden to the insurer to prove its acts did not prejudice the insured.”).

<sup>7</sup> The Court also rejected the insurer’s no harm, no foul argument. *See id.* (“Greenwich’s ‘no harm, no foul’ argument is unsupportable as a matter of public policy and has already been rejected by the Washington Supreme Court.”).

1 First, the defending insurers have repeatedly failed to pay for certain defense and  
 2 litigation costs. *Dkt. 72* at ¶ 9. This non-payment has significantly harmed Rushforth's  
 3 defense, including Rushforth's ability to meet case deadlines and properly prepare for certain  
 4 depositions. *Id.*<sup>8</sup> If Wesco and USIC had timely accepted their duties to defend, they would  
 5 have presumably met their defense obligations and ensured timely payment. But Wesco and  
 6 USIC were not defending, didn't ensure payment, and Rushforth's defense position suffered  
 7 significant harm as a result. *Id.*

8 Second, to prevent further harm to its defense, Rushforth has been forced to pay  
 9 defense and litigation costs that should have been paid by its insurers. *Dkt. 72* at ¶ 10.  
 10 Rushforth paid one of its experts more than \$22,000. *Second Declaration of Brenna Mann in*  
 11 *Support of Plaintiff's Motion for Partial Summary Judgment* ¶ 3. Rushforth also had to pay  
 12 third-party vendors (providing e-discovery support) nearly \$20,000. *Id.* These payments  
 13 might have been unnecessary if Wesco and USIC were participating in the defense. And even  
 14 if Rushforth is eventually reimbursed for these amounts, Rushforth will still have suffered  
 15 harm by the lost "time value" of the litigation costs it fronted.<sup>9</sup>

16 Finally, it is impossible to know how Rushforth's position in the Underlying Action  
 17 would be different had Wesco and USIC timely participated in the defense. The damages  
 18

19 <sup>8</sup> To avoid prejudice in the ongoing Underlying Action, Rushforth can only broadly describe the harm its  
 20 defense has suffered.

21 <sup>9</sup> See, e.g., Liberty Mut. Ins. Co. v. Black & Decker, Inc., CIV.A.04-10648 DPW, 2004 WL 1941352, at \*7  
 22 (D. Mass. Aug. 25, 2004) ("While Liberty Mutual eventually reimbursed the defense costs, it did not *timely*  
 23 fulfill that obligation for all of the bills submitted. That in itself constitutes a breach."); Hizer v. Gen. Motors Corp., Allison Gas Turbine Div., 888 F. Supp. 1453, 1459 (S.D. Ind. 1995) ("Given the time value of money, a material term of any obligation to pay money is the time the payment must be made."); Weidenhamer v. Expedia, Inc., No. C14-1239RAJ, 2015 WL 1292978, at \*4 (W.D. Wash. Mar. 23, 2015) ("A 'full' refund is not 'full' compensation unless it comes with compensation for the lost time value of the money.").

alleged in the Underlying Action have more than tripled since Rushforth tendered its claim to Wesco and USIC. *Dkt.* 72 at ¶ 11. If Wesco and USIC had accepted the defense at that time, the Underlying Action—or at least the part of the case involving Wesco’s and USIC’s named insureds—might have settled for far less than Rushforth’s current liability exposure. But Wesco and USIC did not timely accept their duties to defend and, as the Washington Supreme Court explained, “the course cannot be rerun”:

The course cannot be rerun, no amount of evidence will prove what might have occurred if a different route had been taken. By its own actions, [the insurer] irrevocably fixed the course of events concerning the lawsuit for the first 10 months. Of necessity, this establishes prejudice.

Butler, 823 P.2d at 504 (quoting Transamerica Ins. Group v. Chubb & Son, Inc. 554 P.2d 1080, 1083 (Wash. Ct. App. 1976). While Wesco’s and USIC’s actions already “irrevocably fixed the course of events,” one thing is for certain: Rushforth continues to face risk and uncertainty in the Underlying Action.

#### **E. WESCO AND USIC ARE NOT ENTITLED TO “CURE” THEIR BREACHES**

It is a basic contract principle that once one party materially breaches a contract, it excuses the other party’s performance. *See Colorado Structures, Inc. v. Ins. Co. of the West*, 167 P.3d 1125, 1131 (Wash. 2007) (“If the breach is ‘material,’ the promisee . . . may treat the breach as a failure of a condition that excuses further performance.”); *see also Weyerhaeuser Co. v. Com. Union Ins. Co.*, 15 P.3d 115, 122 (Wash. 2000) (“In Washington, insurance policies are construed as contracts.”). A breach is “material” when it “substantially defeats the purpose of the contract.” Park Ave. Condo. Owners Ass’n v. Buchan Developments, L.L.C., 71 P.3d 692, 698 (Wash. App. Div. 1 2003) (*citing* 6A Washington Pattern Jury Instructions: Civil 302.03, at 127 (1997)).

1 “The insurer’s duty to defend the insured is one of the main benefits of the insurance  
 2 contract.” Safeco Ins. Co. of Am. v. Butler, 823 P.2d 499, 504 (Wash. 1992). Thus, Wesco  
 3 and USIC deprived Rushforth of one of the main benefits of the policies—and therefore  
 4 materially breached those policies—by unreasonably failing to defend (let alone respond to  
 5 Rushforth’s claim). As a result, Rushforth is excused from any performance owed under the  
 6 Policies, including any purported obligation to accept Wesco’s and USIC’s belated offers to  
 7 defend:

8 Once an insurer wrongfully denies coverage and refuses to defend, the insured  
 9 will no longer be obligated to comply with his or her own obligations under the  
 10 policy . . . . ***The insured . . . having no duty to reinstate the contract following  
 the insurer’s material breach, should rarely allow the insurer to assume the  
 defense after it has initially refused to do so.***

11 1 Allan D. Windt., INSURANCE CLAIMS & DISPUTES, § 4:9 at 318 (4th ed. 2001) (emphasis  
 12 added); *see also* BellSouth Telecomms., Inc. v. Church & Tower of Fla., Inc., 930 So. 2d 668,  
 13 671-72 (Fla. Dist. Ct. App. 3d Dist. 2006) (“Liberty asserts that, while it wrongfully refused  
 14 to defend, because it now accepts that duty without a reservation of rights, BellSouth has an  
 15 obligation to accept its defense. . . . We disagree. . . . We conclude that, under the  
 16 circumstances presented herein, Liberty has forfeited its right to defend BellSouth in its  
 17 litigation with Trujillo and FP&L.”); Witt v. Universal Automobile Ins. Co., 116 S.W.2d 1095,  
 18 1098 (Tex. Civ. App. 1938) (insurer’s wrongful refusal to defend resulted in waiver of “its  
 19 right to defend the suit, such right was ***lost forever and could not be reclaimed*** or recaptured  
 20 by the company without the insured’s consent . . . .”) (emphasis added).



1 **VI. CONCLUSION**

2 For the foregoing reasons, Rushforth respectfully requests an order that Wesco and  
3 USIC owed and breached their respective duties to defend Rushforth in the Underlying Action,  
4 that those breaches were in bad faith, and that Wesco and USIC cannot cure their breaches and  
5 bad faith by offering Rushforth a belated defense.

6 DATED this 8<sup>th</sup> day of February, 2018.

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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the United States that on the below date I served this document on the following parties and counsel of record in the manner indicated:

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I further certify that, pursuant to Section III(M) of the *U.S. District Court Amended Electronic Filing Procedures*, I electronically delivered a proposed Order in Word format to the following judge's email:

**EMAIL ADDRESS**

CoughenourOrders@wawd.uscourts.gov

DATED February 8, 2018 in Seattle, Washington.

  
 Nicole Plouf

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY  
 JUDGMENT AGAINST DEFENDANTS WESCO  
 INSURANCE COMPANY AND UNITED SPECIALTY  
 INSURANCE COMPANY - 18

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